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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 462

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioner,
v.
FEDERAL POWER COMMISSION, ET AL.,
Respondents.

No. 463

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
Petitioner,
v.
FEDERAL POWER COMMISSION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IDAHO FISH AND GAME COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (IV R. 373-387)[1] is reported at 358 F. 2d 840. The opinion and order of the Federal Power Commission (R.

[1] "R." references are to the joint appendix in the court below (volumes I-III of the record in this Court). "IV R." references are to volume IV of the record in this Court.

609-717) are reported at 31 F.P.C. 247; its opinion and order on rehearing (R. 780-805) are reported at 31 F.P.C. 1051.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1).

STATUTE INVOLVED

The statutory provisions primarily involved are the Federal Power Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. 791a *et seq.*, and Sections 30-501, 30-502, 30-504, 30-505, 42-206 and 61-327, Idaho Code. The relevant sections of the Idaho Code are printed in Appendix A to this brief.

STATEMENT OF THE CASE

These cases are here upon the petitions of the Washington Public Power Supply System (hereinafter "WPPSS"), and Stewart L. Udall, Secretary of the Interior, (hereinafter "Secretary") to review the judgment of the Court of Appeals for the District of Columbia Circuit, (IV R. 372, 373-387) upholding an order of the Federal Power Commission (hereinafter "Commission"), dated February 5, 1964 (R. 609), as amended by an order on rehearing dated April 30, 1964 (R. 780). This order of the FPC granted a license to the Pacific Northwest Power Company (hereinafter "PNPC") and denied a license to WPPSS to construct the High Mountain Sheep Hydroelectric Project (FPC Project Number 2243), on the Snake River within the states of Oregon and Idaho, a mile upstream from the confluence of the Snake and Salmon Rivers, some 15 miles from the Oregon-Washington boundary, where the Snake River becomes the boundary of the States of Idaho and Washington (R. 443, 445, 525, 609).

The resources involved in this proceeding are natural resources largely of the State of Idaho. The people of this State are vitally interested in the preservation of the fisheries resources which will be affected by the decision of this Court. This Respondent is the statutory commission of the State of Idaho charged with the duties of preservation,

protection, propagation and management of the fish and wildlife resources within the State, and in waters boundary thereto. To protect these interests, this Respondent has participated in this matter since its initiation before the Commission in 1954, and was a party in the proceedings in the court below.

WPPSS is a corporation, described as a "municipal corporation" and a "joint operating agency," composed of sixteen public utility districts of the State of Washington, organized under the laws of Washington (RCW 43.52), and pursuant to an order of the Department of Conservation and Development of the State of Washington, dated January 31, 1957, to acquire, construct and operate electrical generating and transmission facilities. It does not own or operate any electrical facilities.

PNPC is an Oregon corporation, qualified to do business in the States of Oregon, Idaho, Washington and Montana. It is a wholly owned subsidiary of four sponsoring companies, The Montana Power Company, Pacific Power and Light Company, Portland General Electric Company, and the Washington Water Power Company and was formed in April of 1954 for the purpose of providing a supplemental source of power to meet the future requirements of these companies. It does not itself own or operate any electric facilities.

On March 31, 1958, PNPC applied to the Commission for a license to construct the High Mountain

Sheep Project (R. 165, 444). This application was entitled "Middle Snake River Project in the Middle Snake River in the States of Oregon and Idaho by Pacific Northwest Power Company." While describing the High Mountain Sheep Development, the Lower Canyon Development and the Nez Perce Development as developments that might constitute the Middle Snake River Project, this application specifically requested a license for the High Mountain Sheep Development.

On March 15, 1960, WPPSS filed an application for a license to construct the Nez Perce Project, at river mile 186.2 on the Snake River in the States of Oregon and Idaho, about three miles downstream from the High Mountain Sheep damsite, and below the confluence of the Snake and Salmon Rivers (R. 247, 443-444, 612). Since the Nez Perce Project is mutually exclusive of the High Mountain Sheep Project, the applications were consolidated for hearing (R. 258).

The consolidated hearings on the applications were commenced before the Commission on November 4, 1960. Thereafter, on April 24, 1961, WPPSS moved to amend its license application to include the High Mountain Sheep Project as an alternative to its Nez Perce Project. (R. 612).

On February 5, 1964, the Commission issued its Opinion and Order Granting License, wherein it granted a license to PNPC to construct the High

Mountain Sheep Project, and found, among other things, that the High Mountain Sheep site, rather than the Nez Perce site, was best adapted to a comprehensive plan for developing the Middle Snake River because of the probable adverse effect on the anadromous fish runs of the Salmon River if a project were built at the Nez Perce site (R. 639-640).

On April 30, 1964, the Commission denied applications for rehearing and stay of its Order of February 5, 1964, and the Secretary and WPPSS sought judicial review. Neither petitioner seeks a reversal of the decision of the Commission that High Mountain Sheep was the project best adapted to a comprehensive development of the Middle Snake River. Instead, WPPSS asks this Court to deprive PNPC of the fruits of its labor in favor of an entity, WPPSS, which, under judgment of a court of competent jurisdiction, has no legal power to construct the project and which the Commission has found has no use or market for the power. The Secretary claims that there was insufficient evidence before the Commission to justify awarding the license to PNPC and not recommending federal construction.

ARGUMENT

I. THE CONSTRUCTION OF HIGH MOUNTAIN SHEEP DAM IN ACCORDANCE WITH THE LICENSE TO PNPC IS IN THE BEST INTERESTS OF THE CONSERVATION CONSIDERATIONS INVOLVED IN THESE PROCEEDINGS, AND A REVERSAL AND REMAND WOULD BE CONTRARY TO THE SOUND INTERESTS OF CONSERVATION.

The fish problem in connection with the two original projects and plans of development has played a most important part throughout these proceedings. This is borne out by the statement of the FPC in its Opinion and Order Granting License (R. 640), wherein it stated:

> "The HMS (High Mountain Sheep) plan, however, has one decisive advantage over the Nez Perce Plan. It permits postponement of a dam on the Salmon River until the fish passage problem is more clearly solved. On this basis we believe the HMS site rather than the Nez Perce site should be developed."
> (Parenthetical material supplied.)

The interest of conservation was not wholly satisfied when the High Mountain Sheep Project prevailed over the destructive Nez Perce project dog-

gedly espoused by WPPSS. This Respondent has had many years contact with Respondent PNPC and the utility companies behind it. This Respondent has had almost equally long experience with WPPSS and the public power agencies associated with it. PNPC and its utility sponsors have earned our respect as organizations that can be relied upon to make a sincere attempt to find sound conservation solutions. So much cannot be said of WPPSS. Our experience has been that PNPC and its utility sponsors have displayed a sincere and aggressive desire to preserve the fishery resources affected by the High Mountain Sheep Project and hydroelectric projects in the past. Such a desire has not been displayed by WPPSS. This Respondent is, therefore, most interested in who the licensee is to be.

There are sound reasons why this Respondent (as well as all of the other parties representing fishery interests) have favored the High Mountain Sheep Project by PNPC, rather than WPPSS. PNPC has a long record of showing the utmost consideration for the fishery resources, and it has gone far beyond the bounds of bare necessity to display a sincere concern for these resources.

From the outset of these proceedings, PNPC publicly bound itself to the proposition that it would consider no construction on the Salmon River, i.e., a Lower Canyon project, until the problem of passage of anadromous fish was resolved. One of the controlling reasons for applying for a license for Moun-

tain Sheep-Pleasant Valley was PNPC's desire to protect the Imnaha River fishery. When the decision of the Commission practically invited PNPC to file for Nez Perce, PNPC went to a great deal of expense and inconvenience to find an alternate dam site that would be the least detrimental to fish and yet not forego the full power-producing potential of the Middle Snake River System. It could have, with much less expense, ignored the best interests of the fishery resource and applied for a license to construct the Nez Perce Project. As a means of preserving the Imnaha River fishery, PNPC proposed a costly man-made canal to provide as natural a condition as possible for the fish. PNPC even went so far as to propose artificial spawning channels at the mouth of the Salmon River for relocation of the upper Snake River runs in an attempt to save what remains of those unfortunate runs of fish. All of these proposals have been made with no pressure from federal or State conservation agencies or other interested parties.

PNPC's member companies have shown the same concern for the fishery resource on hydro-electric projects presently in operation. Without digressing from the instant matter, we should like to cite a few examples of the construction and research programs undertaken by these companies in the Pacific Northwest. Portland General Electric has installed unique fish passage and water regulating facilities

on its Pelton and North Fork Projects in Oregon, which were costlier but more effective than conventional facilities, when it probably could have obtained Commission approval for less costly facilities. Pacific Power and Light is voluntarily financing a costly research program on Lake Merwin on the Lewis River in Washington, as well as a hatchery operation on one of its tributaries. Washington Water Power has rebuilt the fishways for the third time on its Lewiston Dam on the Clearwater River in Idaho without being legally required to do so; and in August of 1963, it removed a dam on the South Fork of the Clearwater River, so as to enable the program of re-establishing runs of anadromous fish in that tributary. This Respondent therefore is confident that PNPC would continue to exhibit the utmost of good faith and effort to fully protect the fishery resource.

WPPSS, on the other hand, did not even hire its engineer and biologist to design fish facilities for Nez Perce until after it had applied for its license, clearly suggesting that the need for fish facilities was an afterthought but something that had to be submitted for the record. As a result, it provided the same inadequate facilities for High Mountain Sheep as it had for Nez Perce. During these proceedings, WPPSS indicated a willingness to forsake fish for more immediate power. It admitted that fish passage over Nez Perce was questionable, but

that it was still willing to take the risk. It finally suggested that the fishery resource of the Middle Snake River was expendable when balanced against the power loss resulting from postponement of development of the Salmon River. It would undoubtedly oppose being required to build the more costly canal for the Imnaha fish at High Mountain Sheep which PNPC voluntarily proposed. This Respondent cannot help but believe that the fishery resource would continue to play a very minor role in WPPSS's plans.

It is significant that after the record was made on the fishery issues WPPSS had the temerity to make application for a High Mountain Sheep dam, in realization that the evidence for assurance of successful fish passage at Nez Perce had gone against it. When it is considered that the whole case of WPPSS was based upon the theory that it would successfully pass the fish at Nez Perce, and it then became an alternate applicant for High Mountain Sheep, where can credibility be found for it?

II. WPPSS DOES NOT HAVE AND CANNOT OBTAIN LEGAL CAPACITY TO PERFORM UNDER A LICENSE

The Commission found that WPPSS failed to show that it has complied with the laws of the State of Idaho concerning its right to do business

within Idaho; or to own or possess property within Idaho; or to carry on a utility operation within Idaho, or to have or acquire water rights within Idaho, or to construct the proposed projects within Idaho (R. 460).

Admittedly, PNPC met all the requirements of Section 9(b) of the Federal Power Act, by submitting in its application for license evidence of compliance with the laws of the State of Idaho regarding qualifications to do business, and the acquisition of property and water rights within the State.

WPPSS argued that proof of these matters is not necessary, that compliance therewith has been superseded by federal law and that in any event they can be resolved later. In a license proceeding by one party this may be a satisfactory procedure; however, in a situation where the Commission is confronted by competing applicants, one of which endeavors to comply with state requirements and the other's ability to comply is doubtful, the "duality of control" between "cooperating agencies of government."[1] requires in the public interest that the license be granted to the former.

WPPSS does not have the legal authority to construct projects outside the State of Washington. *Washington Public Power System v. Pacific North-*

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[1] **First Iowa Hydroelectric Cooperative v. FPC, 328 US 152 (1946).**

west Power Company, 217 F. Supp. 481 (D.C. Ore., 1963). Moreover, WPPSS would be unable to acquire land in the State of Idaho required for the project, Idaho Code §61-327, could not qualify to do business in the State of Idaho, Idaho Code §30-501, 502, 504 and 505, and could not acquire water rights under the laws of the State of Idaho, Idaho Code §42-206. No attempt has been made by WPPSS to comply with any of these laws. Surely it is not the intention of the Federal Power Act that under it licensees which are repugnant to the policy of a state can force themselves into the state in contravention to the laws thereof.

WPPSS has not only failed to provide "satisfactory evidence" of compliance with the laws of the State of Idaho, but it has done its best to prevent a decision by the courts of this State determining the applicability of such laws to WPPSS. In *State of Idaho, ex rel George N. Carter, State Reclamation Engineer v. Washington Public Power Supply System, a municipal corporation of the State of Washington*, (District Court, County of Ada, State of Idaho, Civil No. 32127), the State, through the office of its Attorney General, brought action in its own courts in March of 1962, for a declaratory judgment as to the matters set forth in the preceding paragraph. WPPSS removed the suit from the state court to federal court and then sought dismissal on the ground that there was no adequate ser-

vice *because WPPSS was never present in the State!*[1]

III. THE SECRETARY'S CONTENTIONS REGARDING ALLEGED INADEQUACIES OF THE RECORD ARE UNTIMELY AND DEVOID OF MERIT.

It is not for this Court to determine whether there were sufficient standards and evidence before the Commission to justify awarding the license to PNPC and not recommending federal construction. Moreover, it would seem rather late for the Secretary to argue that he should have been permitted to present additional evidence regarding federal construction of High Mountain Sheep. This matter came before the Commission on September 7, 1955, when PNPC applied for a license on the Mountain Sheep-Pleasant Valley Project. The Secretary has had since that time to present evidence before the Commission why the United States should build High Mountain Sheep. Having remained mute until after the last hearing was adjourned he should be considered to have waived his right to complain.

In any event, considerable delay would result if the records were reopened for the Secretary or federal construction recommended. The prompt con-

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[1] **State of Idaho, ex rel, George N. Carter, State Reclamation Engineer v. Washington Public Power Supply System, a municipal corporation of the State of Washington, (U.S.D. C., S.D. of Idaho, No. 3759).**

struction of High Mountain Sheep Dam above the confluence of the Snake and Salmon Rivers in accordance with the license issued to PNPC is in the best interests of the conservation considerations involved in this proceeding. This matter has been pending since PNPC's application for a preliminary permit on November 9, 1954. In any realistic comparison of federal with non-federal construction, the factor of delay must be evaluated.

PNPC is ready to build a dam at the High Mountain Sheep site. It has expended a great deal of money, since issuance of a preliminary permit in 1955, on site explorations and planning. It has fought off the efforts of another come-lately applicant, WPPSS, to appropriate the site on a claim of public power priority. The Department of Interior got into the act still later. At no time during this period, in which the Commission actively processed the various license applications covering this reach of the river, did the Department of Interior request authorization to build High Mountain Sheep. So far as the record discloses, the Secretary has not asked the Bureau of the Budget for authorization to build High Mountain Sheep, nor has he requested Congressional authorization or approval of a High Mountain Sheep project. On page 29 of his brief the Secretary states that he now agrees that early construction of High Mountain Sheep is justified and that he is ready to go into Congress and ask

for authorization to build a federal dam at the High Mountain Sheep site, *if*, on remand, the Commission recommends federal development. But, of course, the Secretary has no assurance that Congress would appropriate the money for this project when two non-federal applicants are eager to construct it. There is no certainty that Congress would approve a federal dam *if* this Court ruled in favor of the Secretary and *if* the Commission, on remand, recommended federal development. In these circumstances and in view of the united opposition to federal development of local interests in the Pacific Northwest both private and public, there is good reason to believe that federal development would not be authorized by Congress.

It is interesting to note that both Secretary Udall and his predecessor had previously cited the fish passage problem as their sole reason for opposing licensing of High Mountain Sheep. In his brief before this Court, the Secretary now maintains that the High Mountain Sheep Project should be constructed by the federal government rather than a non-federal licensee because the federal government is far more capable of performing with maximum effectiveness such non-power functions as fish conservation and protecting the salmon runs. In so maintaining, the Secretary questions, *inter alia*, a licensee's willingness to comply with a request by federal or State conservation agencies to release stored waters at

High Mountain Sheep to protect the salmon runs when the water downstream is too hot or insufficiently oxygenated.

Where it is so suggested that the construction and operation of a project by one rather than another entity will best serve the interests of the fisheries resources, this Respondent is concerned that, by silence, our concurrence in this statement would be implied. Because of this possibility it is desirable that we state to this Court that the experience of this Respondent does not indicate any basis for the conclusion that better fish passage and conservation practices will result at a project because it is federally constructed.

As previously noted, our experience has been that PNPC and its utility sponsors have displayed a sincere and aggressive desire to preserve the fishery resources affected by this project and hydroelectric projects in the past. It should also be noted that the Commission can and does require, as a condition of licensing a water resource that the licensee undertake to perform non-power functions. As to the facilities to be provided in the event the project is constructed by other than the federal government, the Commission designates the facilities to be provided and, if desirable, can condition the license upon future modifications where necessary. The license issued to PNPC by the Commission's order dated February 5, 1964, thus provides that PNPC shall, for the conservation and development of fish

and wildlife resources, construct and operate such facilities and comply with such reasonable modifications of the project structures and operation as may be ordered by the Commission (Article 53, R. 681).

It has been the practice of the Commission to consider the recommendations of State conservation agencies in providing for the construction and operation of fish facilities, and, in recent years, Commission licenses so provide. (See PNPC license, Article 53, R. 681). This has not been the case on federal projects. This Respondent feels that each state should have as much control as possible over the fisheries resources located therein, and in waters boundarly thereto. Under Commission procedure, State conservation agencies have a well established and receptive forum in which to present their positions and suggestions. In these circumstances, this Respondent believes that the construction and operation of the High Mountain Sheep Dam by PNPC rather than the federal government will equally, if not better, serve the interests of the fisheries resources.

IV. A REVERSAL AND REMAND OF THE DECISIONS BELOW LEAVES OPEN THE POSSIBILITLY OF THE NEZ PERCE PROJECT AGAIN BEING PROPOSED.

If for no other reason, the State of Idaho opposes a reversal and remand of the decisions below on

the grounds that this would leave the matter of the development of the Middle Snake River unsettled; and, as stated before, subject to further extensive delay. The net result of the inherent uncertainty and delay would be to again open the door to the unacceptable risk of Nez Perce on the assurance that safe methods of fish passage there could be found before its construction. Obviously, conservation of the invaluable fishery resource of the Salmon River and the efforts of this Respondent to have the Salmon River declared a fish sanctuary calls for our unqualified support of the early construction of High Mountain Sheep Dam under the license of PNPC so as to forever foreclose the danger of Nez Perce project.

CONCLUSION

The prompt construction of High Mountain Sheep Dam above the confluence of the Snake and Salmon Rivers in accordance with the license issued to PNPC is in the best interests of the conservation of the State's wildlife resources, particularly with respect to the conservation of the invaluable fishery resource involved herein. Conservation of the fishery resource was the principal consideration for the true public interest finding that the last high dam in this reach of the Snake River must be above the mouth of the Salmon River, and such dam should be built by PNPC, which has shown the highest regard for fishery resource. PNPC's dogged determination

to protect the Salmon River, despite a decision of the Commission practically inviting PNPC to file for a Nez Perce license, has only caused it considerable financial loss and the risk of losing all hope of developing the Middle Snake River. Such placing of the public welfare ahead of the profit motive is rare and should not go unrewarded. The decisions below in Case No. 18728, *Washington Public Power Supply System v. Federal Power Commission*, and Case No. 18731, *Secretary of The Interior v. Federal Power Commission*, should be affirmed.

Respectfully submitted,

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APPENDIX

A. Relevant Provisions of the Idaho Code 1a

APPENDIX A

RELEVANT SECTIONS OF THE IDAHO CODE

30-501. Filing of evidence of incorporation—Prerequisite to doing business.—Every corporation not created under the laws of this state or of the United States must, before doing business in this state, file for record with the secretary of state a copy of the articles of incorporation of said corporation, duly certified to by the secretary of state of the state in which said corporation was organized, or such other legal custodian of the corporation records of said state as is qualified under its laws to make such certified copy, and file for record a copy of such articles of incorporation, duly certified by the secretary of state of this state and bearing the endorsement of the fact and time of filing for record in his office, in the office of the county recorder of the county in this state in which is designated its principal place of business in this state. * * * .

30-502. Designation of statutory agent.—Such corporation must also within three months from the time of commencement to do business in this state, designate some person or persons in the county in which the principal place of business of such corporation in the state is situated, upon whom process issued by authority of or under any law of this state may be served, and within the time aforesaid must

file such designation for record in the office of the secretary of state, and file for record in the office of the county recorder of such county a copy of such designation, duly certified by such secretary of state, and bearing the indorsement of the fact and time of filing for record in the office of the secretary of state. A copy of such designation, certified by either of said officers, shall be conclusive evidence, in all courts and elsewhere, of the fact of such designation.

It is lawful to serve on any of such persons so designated any process issued as aforesaid, and such service must be deemed a valid service thereof.

Such notice and designation of any agent on whom process may be served, shall run from the time of filing the same for record as herein provided, until his successor is appointed by such filing, or said office becomes vacant by resignation filed for record by such agent in the offices in which his appointment is filed for record, or by his death or removal from such county, and in case of such vacancy, if there be no other designated agent, said corporation shall, within sixty days thereafter, refill said office in the manner above provided for the designation of such agent.

30-504. Noncompliance—Effect on contracts.—No contract or agreement made in the name of, or for the use or benefit of, such corporation prior to the making of such filings as provided in sections

30-501 and 30-502 can be sued upon or enforced in any court of this state by such corporation.

30-505. Noncompliance — Effect on real estate holdings.—If any such corporation takes or holds title to any realty within this state prior to making such filings, any pretended deed or conveyance of real estate to such corporation prior to such filings shall be voidable; and upon petition of any interested party the district court in the county where such real estate is situated may decree such deed or conveyance void in the event such filings are not made prior to the entering of such decree.

42-206. Residence a requisite for issuance.—No permit to appropriate water for power purposes in the state of Idaho shall hereafter be granted to any person or association of persons not an actual bona fide resident or residents of the state of Idaho, nor to any corporation unless organized or qualified to do business in and under the laws of the state of Idaho.

61-327. Electric utility property—Acquisition by certain public agencies prohibited.—No title to or interest in any property located in this state which is used in the generation, transmission, distribution or supply of electric power and energy to the public or any portion thereof, shall be transferred or transferable to, or acquired by, directly or indirectly, by any means or device whatsoever, any government or municipal corporation, quasi-municipal corpora-

tion, or governmental or political unit, subdivision or corporation, organized or existing under the laws of any other state; or any person, firm, association, corporation or organization acting as trustee, nominee, agent or representative for or in concert or arrangement with, any such government or municipal corporation, quasi-municipal corporation, or governmental or political unit, subdivision or corporation; or any company, association, organization or corporation, organized or existing under the laws of this state or any other state, whose issued capital stock, or other evidence of ownership, membership or other interest therein, or in the property thereof, is owned or controlled, directly or indirectly, by any such government or municipal corporation, quasi-municipal corporation, or governmental or political unit, subdivision or corporation; * * * .